NORTHWEST EXPLORATION, INC.
(ON JUDICIAL REMAND)

IBLA 80-787 Decided October 17, 1985

Appeal from decision of the Alaska State Office, Bureau of Land Management, declaring mining claims null and void ab initio. On remand after decision in Northwest Exploration, Inc. v. Watt, Civ. No. A 80-81 (D. Alaska July 7, 1982).

Affirmed as modified.

1. Mining Claims: Lands Subject to--Withdrawals and Reservations: Generally

Where the Government stipulates on appeal that a protective withdrawal noted on the public lands records in 1965 was merely temporary, as alleged by appellant seeking to prove that under the Pickett Act, 43 U.S.C. §§ 141-142, (1970) the temporarily withdrawn lands were open to location for metalliferous minerals, the Board will defer to the parties' agreement as to the nature of the withdrawal. That the withdrawal is found to be merely temporary does not alter the fact that the general public was led to believe otherwise by virtue of the withdrawal's notation on the public land records, and, under the "tract book" or "notation rule" principle, the existence of a withdrawal entry on these records, whether valid or invalid, bars any conflicting appropriation of the land.

APPEARANCES: Constance E. Brooks, Esq., Michael R. Perna, Esq., Denver, Colorado, for Northwest Exploration Inc.; Robert C. Babson, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management and the National Park Service.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

This matter is before the Board on remand from the United States District Court, District of Alaska (District Court), per its order of July 7, 1982, in Northwest Exploration, Inc. v. Watt, Civ. No. A 80-81. The District Court reviewed our decision in Northwest Exploration, Inc., 52 IBLA 87 (1981), wherein we had affirmed the decision of the Alaska State Office, Bureau of Land Management (BLM), declaring various placer mining claims null and void in their entirety or in part for the reason that the claims were located on lands then segregated and closed to mineral entry.

Northwest Exploration, Inc.'s (Northwest) claims were located in 1966 and 1969 in the Kantishna area, adjacent to Mt. McKinley National Park (now, Denali National Park) in Alaska. 1/ On April 22, 1965, BLM filed withdrawal application F-034575 encompassing the lands on which Northwest's claims were subsequently located. The withdrawal was filed by BLM pursuant to delegated power from the President, set forth in Exec. Order No. 10355, 17 F.R. 4831 (May 26, 1952), to withdraw land for establishment of protective areas as authorized by the Act of June 25, 1910, 36 Stat. 847 (43 U.S.C. §§ 141-142 (1970)), commonly known as the Pickett Act. 2/ The withdrawal was noted to the official status plats in the Fairbanks BLM office on May 4, 1965, and notice thereof was published in the Federal Register on May 13, 1965, 30 FR 6593.

In Northwest, supra, the Board held that where BLM filed an application for a protective withdrawal pursuant to Exec. Order No. 10355 which would reserve the subject land from all forms of appropriation including the mining laws, and the application was duly noted on the official status plats, lands were segregated from the date of notation, to the extent that the withdrawal, if effected, would prevent such forms of appropriation. The Board held that a protective withdrawal was not a temporary withdrawal under the Pickett Act, and was not limited by 43 U.S.C. § 142 (1970) which provided that such withdrawn lands shall remain open to location for metalliferous minerals. 52 IBLA 95-96.

On review, the District Court found, as did the Board, that the Kantishna withdrawal was made to establish a BLM protective area. However, referring to the BLM manual, the District Court further found that the protective withdrawal program could embrace at least some withdrawals which are temporary in nature and thus subject to the limitation of the Pickett Act. The District Court vacated our decision because it found that we had not

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1/ The lands embracing the locations were finally withdrawn from mineral entry by Public Land Order No. 5179 on Mar. 17, 1972, pursuant to section 17(d) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1616(d) (1982).

2/ Relevant portions of the Pickett Act of June 25, 1910, read as follows:

"§ 141. Withdrawal and reservation of lands for water-power sites or other purposes.

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public land of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (June 25, 1910, ch. 421, § 1, 36 Stat. 847.)

"§ 142. Lands withdrawn open to exploration under mining laws; rights of occupants or claimants of oil- or gas-bearing lands; national forests.

"All lands withdrawn under the provisions of this section and section 141 of this title shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: * * *. (June 25, 1910, ch. 421, § 2, 36 Stat. 847; Aug. 24, 1912, ch. 369, 37 Stat. 497.)"

Section 141 was repealed and section 142 amended by the Federal Land Policy and Management Act of 1976 (FLPMA), § 704(a), 90 Stat. 2792.

carefully assessed this particular withdrawal to determine whether it was for a present (permanent) use or merely intended to preserve the status quo pending later legislative or administrative action (temporary purpose).

In response to the District Court's remand, the National Park Service (NPS) filed a report with the Board on November 1, 1982, stating:

> [T]he Bureau of Land Management's (BLM) purpose in requesting the Kantishna Protective Withdrawal in 1965 was to protect the status quo pending future study of the area by both the BLM and the National Park Service. The important fact would seem to be that the actual administrative decision as to the use the Kantishna area would be put was to be made at some unspecified date in the future based upon the results of the BLM and NPS studies. Thus, in 1965, the withdrawal (if enacted) would have been made pending a future administrative act and, under the District Court's definition, would have been "temporary" in nature. As such, under the provisions of the Pickett Act, it could not have legally withdrawn the area from metalliferous mineral entry. 43 U.S.C. § 142.

NPS also asserted, however, that regardless of the validity of the withdrawal, Northwest's claims were invalid as a matter of law by reason of the so-called "notation" or tractbook rule.

By order dated April 7, 1983, the Board reopened the record for briefing on the applicability of the notation rule, a question we had not addressed in our initial decision. We noted in our order that in the absence of a clear statement from the District Court prohibiting consideration of the notation rule, we would not assume that the court meant to preempt the Department's authority to initially determine all facts related to a claim of entitlement to land or the minerals found thereon. See United States v. Haskins, 59 IBLA 56-57, 88 I.D. 925, 953 (1981); Cameron v. United States, 252 U.S. 450 (1920); Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981). Northwest and BLM have each filed extensive briefs with the Board addressing the application of the notation rule to this case. We proceed to a consideration of this issue. 3/

[1] Under the "notation" rule, when the official records of BLM have been noted to reflect the devotion of land to a particular use which is exclusive of other conflicting uses, no incompatible rights in that land can attach by reason of any subsequent application or entry until the record has been changed to reflect that the land is no longer so segregated. The rule 4/ has been applied even where the notation was posted to the records

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3/ In view of the Departmental position on remand that the protective withdrawal in 1965 was to protect the status quo pending future studies by BLM and NPS, thereby rendering the withdrawal "temporary" in nature, no further fact-finding by the Board on this question is necessary.

4/ The notation rules is a creature of adjudication and does not exist, except in certain subject areas, in the form of a regulation. See, e.g., 43 CFR 1825.1(b) (relinquishments).

in error, or where the segregative use so noted is void, voidable, or has terminated or expired, so long as the records continue to reflect it as efficacious. Paiute Oil and Mining Corp., 67 IBLA 17 (1982). The notation rule was explained in an enclosure to a letter dated April 20, 1964, to the United States Attorney, Salt Lake City, from Attorney General Clark re Jay P. Nielson v. J. E. Keogh, Civ. No. C-158-63, as follows:

> [I]t was held long ago that when a homestead entry is made, even though erroneously, the land is considered as withdrawn from further entry until such time as the entry has been cleared from the records. Bunker Hill Co. v. United States, 226 U.S. 548, 550 (1913); McMichael v. Murphy, 197 U.S. 304, 310-312 (1905); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); Hastings etc. Railroad Co. v. Whitney, 132 U.S. 357, 360-366 (1889); Putnam v. Ickes, 64 U.S. App. D.C. 339, 342, 78 F.2d 223, 226 (1935); Germania Iron Co. v. James, 89 Fed. 811, 814-817 (C.A. 8, 1898), app. dism. 195 U.S. 638.
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> Historically, then, no rights can be obtained in that part of the public domain which has been segregated by reason of a pre-existing appropriation--even one subsequently found to be invalid. This same principle has long been applied by the Secretary to oil and gas leases. Within two years of the enactment of the Mineral Leasing Act, it was held in Martin Judge, 49 L.D. 171, 172 (1922) that "until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit." None of the numerous amendments of the Act since 1922 has questioned the Martin Judge decision which has been uniformly followed by the Department of the Interior. Joyce A. Cabot, 63 I.D. 122-123 (1956); R. B. Whitaker, 63 I.D. 124, 126-128 (1956); Albert C. Massa, 63 I.D. 279, 286 (1956). [Emphasis added.]

Citing Germania Iron Co., supra, among other cases, BLM points out that the purpose of the notation rule is to provide equality of access to those who wish to enter the public lands. BLM contends that even if the withdrawal was void, the lands were segregated thereby and Northwest's mining claims located after segregation were null and void ab initio. BLM suggests that it would subvert the purpose of the notation rule to hold the protective withdrawal without segregative effect as to Northwest's claims.

Northwest agrees that the purpose of the notation rule is to provide equality of access to the public. It alleges, however, that no conflicting claims exist to the lands in question, and that the rule was designed to protect the rights of private parties vis-a-vis each other. Accordingly, Northwest submits that the rule may not be asserted by the Government to defeat the rights of a private party when no other third-party rights are involved.

The Board recently analyzed the notation rule in depth in another mining claim case, B. J. Toohey, 88 IBLA 66, 92 I.D. 317 (1985), in which

appellants challenged BLM's invocation of the rule as arbitrary, capricious, and violative of due process. The Board's decision in Toohey upheld the notation rule as a lawful administrative device that fulfills an important land management function. 88 IBLA at 85, 92 I.D. at 328.

Among the notations at issue in Toohey were withdrawal applications filed before and after passage of FLPMA, 43 U.S.C. §§ 1701-1784 (1982). Section 204 of FLPMA (43 U.S.C. § 1714 (1982)) was described as constituting a statutory exception to the notation rule inasmuch as the segregative effect of a withdrawal application filed after passage of the Act terminates upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of 2 years from the date of the Federal Register notice reporting the filing of the application.

In light of the above, the Board reversed that part of BLM's decision under review which had denied appellants' mining claims because of a post-FLPMA forest withdrawal application noted on the master title plat but which, in fact, had expired under the provisions of section 204, two years after it was noticed in the Federal Register.

The protective withdrawal at issue in this case, however, arose prior to FLPMA. Under the notation rule, regardless of whether the withdrawal was void or voidable, the notation of this pre-FLPMA withdrawal precluded any other appropriation of the land.

Appellants urge the Board to recognize an exception they perceive as to when and how the notation rule may be invoked. Thus it is alleged that the Government may not assert the rule to defeat the rights of a private party when no other third-party rights are involved. We disagree. It has long been recognized that the Secretary of the Interior acts as trustee for the Federal lands on behalf of all the people of the United States. Knight v. United Land Association, 142 U.S. 161 (1891). Consistent with this responsibility, the notation rule evolved as an equal protection doctrine, grounded in fairness to the public at large. Toohey, supra at 78, 92 I.D. at 324. In the context of the case at hand, no one knows how many mining claimants (or other users of the public domain) interested in the same land as Northwest steered clear of entry thereon upon discerning from the public land records that the property was closed to entry by virtue of the protective withdrawal. To award appellant location rights because it ignored the Government's notice to the general public would be an injustice to all those who may have relied upon the public records, and directed their attention to lands eligible for appropriation.

In light of the above, we modify our decision in Northwest Exploration, Inc., 52 IBLA 87 (1981), as follows. It having been conceded by BLM and NPS on appeal that withdrawal application F-034575 was a temporary and not a permanent withdrawal, our holding to the contrary is set aside. While under the provisions of 43 U.S.C. § 142 (1970), temporarily withdrawn lands were to remain open to location for metalliferous minerals, the failure of BLM to note that withdrawal application F-034575 was merely temporary, served as notice to the public at large that such withdrawal was regular and permanent. By virtue of the notation rule, therefore, the lands affected by the withdrawal were ineligible for entry for mining claim purposes. Pursuant to the Board's de novo review authority in reviewing BLM decisionmaking, Eldon

Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976), Northwest's mining claims are held to be null and void on the basis of the notation rule.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's prior decision in this case, 52 IBLA 87 (1981), is affirmed as modified.

Wm. Philip Horton
Chief Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

James L. Burski
Administrative Judge